Supreme Court, U.S.
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No. 03- ____

In the Supreme Court of the United States

ANTHONY J. MILITELLO,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May ERISA pension plan administrators accomplish the violation of ERISA's anti-cutback provisions (29 U.S.C. § 1054(g) by "re-interpretations" of existing pension plan provisions that expand categories of post retirement employment which would trigger benefit suspensions?

2. Do the regulations which implement 29 U.S.C. § 1053(a) authorize unbridled power to impose postretirement benefit suspensions for participants who have not attained normal retirement age?

3. Do ERISA pension plan administrators have the power to avoid de novo review of their claims decisions without notifying plan participants in summary plan descriptions of their discretionary authority to grant or deny claims by plain language calculated to be understood by the average participant?

PARTIES TO THE PROCEEDING

Petitioner

Anthony J. Militello, Petitioner is a retired participant of the Central States Southeast and Southwest Areas Fund. Petitioner is not an affiliate of a publicly owned corporation.

Respondents

Central States, Southeast and Southwest Areas Pension Fund, a jointly-administered, multiemployer, employee benefit plan as is defined by 29 USC § 1002 (1) and (2) to provide retirement income to employees as is authorized by 29 USC § 186(c).

The Board of Trustees of the Central States Southeast and Southwest Areas Pension Fund is the administrator of the Central States Southeast and Southwest Areas Pension Fund.

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PETITION FOR WRIT OF CERTIORARI

Anthony J. Militello respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 3, 2004.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix 3a to 22a and is reported at 360 F 3rd 681.

The opinion of the United States District Court appears at Appendix 23a to 37a and is reported at 209 F Supp. 2nd 923.

JURISDICTION

The Court of Appeals for the Seventh Circuit issued its opinion on March 3, 2004. A timely petition for rehearing en banc was filed. The petition was overruled by order dated April 2, 2004. A copy of the Order Overruling Petition for Hearing En Banc appears at Appendix 1a and 2a. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of rehearing.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED IN THIS CASE

Constitutional provisions are not involved in this case.

This case involves the following statutes:

29 U.S.C. § 1054(g)(2), ERISA § 204(g)(2) provides that "a plan amendment which has the effect of . . . eliminating or

reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits."

29 U.S.C. § 1053(a), ERISA § 203(a) provides in relevant part,"[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age."

29 U.S.C. § 1053 (a)(3)(b), ERISA § 203(a)(3)(B) provides in relevant part that

> [a] right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as [beneficiaries like respondents are] employed . . . in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

29 U.S.C. § 1053 is implemented by the Department of Labor regulations.

29 C.F.R. § 2530.203-3(b) provides

> (1) General rule. A plan may provide for the permanent withholding of an amount which does not exceed the suspendable amount of an employee's accrued benefit for each calendar month, or for each four or five week payroll period ending in a calendar month, during which an employee is employed in "section 203(a)(3)(B) service" as described in § 2530.203-3(c). Bold typeface added.

29 C.F.R. § 2530-203(c)(2) speaks in terms of "service (as defined in § 2530.200b-2(a)(1)and(2)", which in turn speak of hours of service, ". . . for which an employee is paid or entitled to payment, for the performance of duties for the employer . . . ." (Bold typeface added.)

The corollary to 29 C.F.R. § 2530.203-3(b) is found in 29 C.F.R. § 2530-203 (b)(2) which requires a plan to resume suspended pension benefit payments, ". . . no later than the first day to the third calendar month in which the employee ceases to be in section 203(a)(3)(B) service. . . ."

29 C.F.R. § 2530.203(c)(2) provides:

> (2) Multiemployer plans. In the case of a multiemployer plan, as defined in section 3(37) of the Act, the employment of an employee subsequent to the time the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment results in section 203(a)(3)(B) service during a calendar month, or during a four or five week payroll period ending in a calendar month, if the employee, in such month or payroll period:
>
> --Completes 40 or more hours of service (as defined in § 2530.200b-2(a)(1) and (2)) or
>
> --Receives payment for any such hours of service performed on each of 8 or more days (separate work shifts) in such month or payroll period, Provided, That the plan has not for any purpose determined or used the actual number of hours of service which would be required to

> be credited to the employee under § 2530.200(b)-(2)(a); in
>
> --An industry in which employees covered by the plan were employed and accrued benefits under the plan as a result of such employment at the time that the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment, **and**
>
> --A trade or craft in which the employee was employed at any time under the plan, **and**
>
> --The geographic area covered by the plan at the time that the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment. (Bold typeface added)

29 U.S.C. § 1022 requires a pension fund to distribute a Summary Plan Description which, " . . . shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their *rights and obligations under the plan.*"(Italics added) "

29 U.S.C. § 1022 is implemented by 29 C.F.R. § 2520.102-3 which states that "The summary plan description must *accurately reflect the contents of the plans* as of the date not earlier than 120 days prior to the date such summary plan description is disclosed." (Italics added)

STATEMENT OF CASE

The Seventh U. S. Circuit Court of Appeals upheld a grant of summary judgment in Petitioner's case brought pursuant to 29 U.S.C. § 1132 in favor of the Pension Plan and its Board of Trustees wherein Petitioner challenged the suspension of his retirement benefits and the claim of the Fund for "recoupment" of $75,400 in pension benefits.

When applying for his pension, Petitioner wrote Central States Southeast and Southwest Areas Pension Fund advising the Fund,"I was advised by the Union that to receive my pension, I must seek your approval to **actively own trucks** and receive a pension." (Bold typeface added) (Appendix 39).

The Central States Plan had no provision which disqualified a retiree from receiving benefits because he owned a business and was responsible for paying expenses incidental to that business and since the Petitioner's responsibility for payment of expenses or the magnitude of those expenses were not disqualifying factors, no inquiry was made by Central States as to those issues

At the time of Petitioner's application for benefits, the Central States Southeast and Southwest Areas Pension Plan provided:

> "Pensioner shall have his benefit payments suspended for any calendar month in which he works in 'Prohibited Reemployment.'" (Pension Plan

§ 4.13(a)). Prohibited Reemployment[1] is defined in part) as

> [e]mployment in any position, including a managerial or supervisory position and including self-employment, but not including government employment, either in the same industry in which the Participant or Pensioner earned any Contributory Service Credit while covered by the Pension Fund, or in any other industry if the Participant or Pensioner is in the same job classification as are other Participants then employed by a Contributing Employer located within the same standard metropolitan statistical area. (Pension Plan § 4.13(f)(3)). (Appendix 15a)

After investigation, the Trustees of the Central States Fund approved retirement pension in the amount of $2,600 per month effective April 1, 1996.

> On November 17, 1997, a representative from a local union informed the Fund that Militello owned and operated a trucking business that employed drivers. The Fund sent Militello a letter, indicating that it had received information that he was the "self-employed owner of a trucking company," and requesting his 1996 federal income tax returns and information regarding his day-to-day duties at the company. Militello replied that he had no duties or drivers and that he leased his equipment to American Motor Lines,

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[1] § 4.13 (f) of the Central States Plan is quoted in its entirety on pages 16 and 17.

> which hired and paid the drivers. Because he did not submit a full copy of his tax returns, the Fund once again requested the returns. The Fund received the requested tax documents which revealed that in 1996, Militello listed his business as "Trucking," and spent almost $100,000 in fuel expenses and over $20,000 for a driver bonus. The Fund's Reemployment Committee determined that Militello's ownership of the trucking business constituted prohibited reemployment and gave Militello thirty days to terminate his ownership or face suspension of benefits. (Appendix 7a)

Mr. Militello retained the ownership of the trucks. He ultimately appealed the suspension of his benefits to the Trustees of the Pension Plan, who denied his appeals and then appealed to the District Court.

In affirming the grant of summary judgment for the Pension Plan and its Trustees, the appellate court concluded:

> . . . [w]e agree with Militello that nothing in the plan allows the Trustees to bar him from owning trucks if he wants to keep his pension. However, Militello's benefits were not suspended merely because he owned trucks; indeed, the Fund was told that he owned and leased trucks when it initially approved his request for benefits. Militello's funds were suspended because the Fund determined that he owned and operated a trucking business employing drivers. . . (Appendix 15a to 16a)

The Appellate Court refused to consider whether self employment was a circumstance which was permitted by the Department of Labor regulations implementing 29 U.S.C.

§ 1053 as the grounds for the suspension of benefits reasoning that Petitioner had not achieved "normal retirement age," (65 years) prior to his retirement. (Appendix 21a and 22a)

The Appellate Court applied the "arbitrary and capricious" standard of review to the decision of the Trustees to deny Petitioner's appeals of its Re-employment Committee to suspend his pension benefits even though the only plan document granting the Trustees discretionary authority to make benefit claims decisions is contained in the Trust Agreement, not in the pension plan itself. (Appendix 8a)

Subsequent to the decision by the appellate court, the decision in Central Laborers' Pension Fund v. Heinz,72 U.S.L.W. 4441 (U.S. June 7, 2004), *affirming* 303 F.3d 802 (7th Cir. 2002) was rendered which prohibits pension plan amendments which would expand categories of postretirement employment which would trigger pension benefit suspensions. In arriving at this conclusion the Court determined that 29 U.S.C. § 1053(a) authorized provisions which would trigger benefit suspensions for persons who had not reached normal retirement age in certain "narrow circumstances."

REASONS WHY THE WRIT SHOULD BE GRANTED

1. **Granting the writ will preclude pension plan administrators from violating ERISA's "anti-cutback prohibition" (29 U.S.C. § 1054(g)) by re interpreting benefit suspension provisions in pension plan documents to include expanded categories of postretirement activities which will trigger benefit suspensions.**

The decision of this court in Central Laborers' Pension Fund v. Heinz, 72 U.S.L.W. 4441 (U.S. June 7, 2004), *affirming* 303 F.3d 802 (7th Cir. 2002) has clearly determined that 29 U.S.C. § 1054(g) prohibits the postretirement amendment of pension plans to include expanded categories of post retirement employment which will justify pension benefit suspensions. "The real question is whether a new condition may be imposed after a benefit has accrued." Id. at___.

The Central Laborers' decision, however, leaves pension plan administrators, especially those given the discretion to "interpret" plan documents, at liberty to accomplish the prohibited purpose by "re-interpreting" benefit plan suspension provisions enacted prior to the retirement/vesting of pension benefits.

At no point during the process of Petitioner's applying for and the initial approval of his pension was any inquiry made about the Mr. Militello's income tax returns, the character of the expenses incurred in his ownership of trucks, or the magnitude of those expenses.

But after paying Mr. Militello $75,400 in pension benefits, the Trustees decided that by being responsible for the payment expenses for fuel and driver bonuses for those trucks

his ownership and leasing of trucks "prohibited reemployment."

The appellate court agreed that based upon the relevant plan language, ". . . [W]e agree that nothing in the plan allows the Trustees to bar him (petitioner) from owning trucks if he wants to keep his pension. . . ." Any suspension of benefits must therefore have been the product of a revised interpretation of the benefit suspension provision of the plan because the initial interpretation was made without regard to Mr. Militello's tax returns[2], the character of expenses, or the magnitude of expenses.

Clearly, by re-interpreting the Plan, a process which was as effective as enacting a formal plan amendment, the Trustees imposed a new condition on Mr. Militello after his benefit had accrued: They subsequently changed the rule forbade him to own and lease trucks *if he had to pay for fuel and driver's bonuses*.

Pension Plan administrators should not be permitted to accomplish by employing the subterfuge of post retirement plan interpretations the same result which could have been accomplished by plan amendment.

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[2] Surely, Central States did not think that Mr. Militello could own and lease trucks without incurring expenses.

2. Granting the writ will insure 29 U.S.C. § 1053 (a)(3)(B) will no longer be viewed as an unqualified license for multi employer pension funds to confiscate vested retirement benefits of participants retiring prior to "normal retirement age"

Contrary to the holding in Central Laborer's Pension Fund v. Heinz, the appellate court determined that 29 C.F.R. § 2530.203- 3 (implementing 29 U.S.C. § 1053 (a)) licenses pension funds to suspend retirement benefits of plan participants who have not attained normal retirement age without paying heed to the remainder of the regulation(s) citing 29 C.F.R. § 2530.203-3(a) and Whisman, v. Robbins, 55 F.3d at 1146-47 (6th Cir. 1995), as its authority.

Whisman held that 29 USC § 1054(g) addresses a reduction or elimination of accrued benefits and retirement-type subsidies, not a suspension. Id. at 1147. The Central Laborers' decision repudiated that distinction; "We simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits."

Whisman further held,

> In the first situation, a participant has not yet qualified for the protection of § 1053(a), which commences upon attainment of normal retirement age, usually age 65, a fact which is reflected in 29 C.F.R. § 2530.203-3(a). . . .
>
> > "The case law thus makes clear that section 203(a) provides no protection against the suspension of benefits of plan participants . . .

> who have not yet reached normal retirement age."). Thus, without running afoul of § 203(a), Central States need not have placed any conditions on the forfeiture of benefits for participants who become reemployed prior to reaching normal retirement age. Id. at 1146. (Parenthesis in the original)

Taking its cue from Whisman, the appellate court determined, " Militello retired at age fifty-three; now sixty-one years old, he has still not attained the normal retirement age, which is defined as sixty-five in the plan. Therefore, this regulation does not pertain to Militello, and we easily dispose of his claim." (Appendix 22a)

Central Laborers' holds, "Accordingly, § 203 (a)(3)(B) suspensions were permissible in narrow circumstances." Since Mr. Heinz had not reached "normal retirement age" under the Central Laborer's Plan, it is now crystal clear that lack of attaining normal retirement age is not one of the "narrow circumstances" which permit such suspensions.

By glibly stating the inapplicability of the regulation implementing 29 U.S.C. § 1053 (a) on the basis that Petitioner had not attained normal retirement age, the appellate court ignored the fundamental question of whether or not "self employment" is one of those "narrow circumstances" which permits benefit suspensions.

Clearly plan may suspend a retirees benefits only if he is employed in "Section 203(a)(3)(b)service." The regulations do not authorize benefit suspensions for self employment as the regulation (29 C.F.R. § 2530.203-3(b)) speaks in terms of "Section 203 (a)(3)(B) service"

29 C.F.R. § 2530-203(c)(2) speaks in terms of "service (as defined in § 2530.200b-2(a)(1)and(2)) . . .", which in turn speak of hours of service, ". . . for which an employee is paid or entitled to payment, **for the performance of duties for the employer** . . . ." (Bold typeface added) not the performance of duties for oneself.

The corollary is found in 29 C.F.R. § 2530-203 (b)(2) which requires a plan to resume suspended pension benefit payments, ". . . no later than the first day to the third calendar month in which the employee ceases to be in section 203(a)(3)(B) service: . . ."

As long as a retiree is not engaged in the performance of duties for an employer, the plan is required to make (or resume) pension benefit payments.

3. Granting the writ will guarantee that millions of pensioners who have not reached "normal retirement age" will not be deprived of pension payments with onerously overbroad pension plan provisions, rules, or plan interpretations which contravene the "narrow circumstances" authorized by 29 USC § 1053(a) as implemented by 29 CFR § 2530.203-3 (c)(2).

In determining that ERISA's "anti-cutback" provision (29 USC § 1054(g)) indeed does apply to postretirement pension benefit suspensions and that 29 USC § 1053(a) provides "narrow exceptions" to the general rule prohibiting such suspensions for persons who had not reached normal retirement age, this Court, in Central Laborers' Pension Fund v. Heinz, 72 U.S.L.W. 4441 (U.S. June 7, 2004), repudiated the underpinnings upon which the Sixth Circuit in Whisman, supra, and the Seventh Circuit in this case employed to deny

retirees like Mr. Militello the protection of the regulatios with implement 29 USC § 1053(a).

The Whisman decision reversed a district court decision wherein it was determined that the benefit suspension provision of the Central States plan as it was then constituted violated 29 CFR § 2530.203-3 (c)(2). The District Court had reasoned:

> The Central States retirement plan, as structured, did not conform to the provisions promulgated by the DOL because they are written in the disjunctive:
>
> Section 4.12 REEMPLOYMENT AND SUSPENSION OF BENEFITS RULES
>
> (a) A Pensioner shall have his benefit payments suspended for any calendar month in which he works in "Prohibited Reemployment" (as defined in subsection (f), below), except that, if he has reached his Vested Pension Retirement Date he may work in Prohibited Reemployment without having his benefit payments suspended....A Pensioner shall permanently lose his rights to any benefit payments which are suspended because of his work in Prohibited Reemployment.
>
> * * * * * *
>
> (f) *Prohibited Reemployment* means **any of the following**:
> (1) Work (in any capacity whether as an employee or self-employed individual) in any of the following job classifications: driver (regardless of the kind of vehicle driven),

> driver helper, warehouseman, dock worker, mechanic, or office clerical; **or**
> (2) Work in the Same Trade or Craft in which the Pensioner was involved during any time he earned Contributory Service Credit; **or**
> (3) Work in any capacity for a Contributing Employer or for an employer which was, at any time, a Contributing Employer or for an employer engaged in the types of business activities in which a Contributing Employer is engaged; **or**
> (4) Work (including self-employment) involving the supervision or management of any employee who performs a job described in (1), above (Doc. # 74 at 36-40)

* * * * * *

The effect of this scheme permits the suspension of benefits if the retiree's reemployment comes within *any single* suspension of benefits provision. Hence, the plan itself is more stringent than the statute or regulations. The record establishes that the Trustees relied upon Section 4.12(a) and (f) of the Central States pension plan to uphold the suspension of Whisman's benefits because his reemployment involved "working for an employer which is engaged in the same business activities as employers which make contributions to this Pension Fund on behalf of their employees" (Doc. # 81 at 10, 338). Whisman v. Robbins, 810 F Supp. 936, 948, (S. D. Ohio, 1992) (Italics and asterisks in the original, bold typeface added)

29 CFR § 2530.203(c)(2) provides:

(2) Multiemployer plans. In the case of a multiemployer plan, as defined in section 3(37) of the Act, the employment of an employee subsequent to the time the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment results in section 203(a)(3)(B) service during a calendar month, or during a four or five week payroll period ending in a calendar month, if the employee, in such month or payroll period:

--Completes 40 or more hours of service (as defined in § 2530.200b-2(a)(1) and (2)) or

--Receives payment for any such hours of service performed on each of 8 or more days (separate work shifts) in such month or payroll period, Provided, That the plan has not for any purpose determined or used the actual number of hours of service which would be required to be credited to the employee under § 2530.200(b)-(2)(a); in

--An industry in which employees covered by the plan were employed and accrued benefits under the plan as a result of such employment at the time that the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment, **and**

> --A trade or craft in which the employee was employed at any time under the plan, **and**
>
> --The geographic area covered by the plan at the time that the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment. (Bold typeface added)

Emboldened by their appellate court victory in Whisman which held that retirement benefits of pensioners younger than 65 years of age could be suspended without limit or qualification the Central States Trustees enacted the plan (Sec. 4.13 (f), provision in effect at the time of the suspension of Mr. Militello's benefits which, retained the onerous "any of" language and, more conspicuously, eliminates the mandatory, "Trade or craft" requirement for the validity of all such plan provisions.

Contrary to the requirements of 29 CFR § 2530.203(c)(2) Central States Plan § 4.13 (f) provides:

> (f) Probibited Reemployment means, on or after March 1, 1990, **any of the following**:
>
> (1) Employment in any position, including a managerial or supervisory position, by a Contributing Employer (or an employer which was Contributing Employer at any time after September 25, 1980); **or**
>
> (2) Employment by an employer, other than a governmental agency, in any position covered by a Teamster Contract between that employer

> and any affiliate of the International Brotherhood of Teamsters; **or**
>
> (3) Employment in any position, including a managerial or supervisory position and including self-employment, but not including government employment, either in the same industry in which the Participant or Pensioner earned any Contributory Service Credit while covered by the Pension Fund, or in any other industry if the Participant or Pensioner is in the same job classification as are other Participants then employed by a Contributing Employer located within the same standard metropolitan statistical area.

The utilization of this type of plan provision to disqualify a retiree from receiving his earned benefits when *any* disqualifying factor occurs instead of all of the disqualifying factors as intended by the regulation must be terminated.

4. Granting the writ will insure that plan participants will receive fair notice in summary plan descriptions of an administrator's intent to have benefit decisions reviewed under the "arbitrary and capricious standard."

A denial of benefits will be reviewed de novo "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

29 U.S.C. § 1022 requires the fund to distribute a Summary Plan Description which, ". . . shall be sufficiently

accurate and comprehensive to reasonably apprise such participants and beneficiaries of their *rights and obligations under the plan.*"(Italics added) "The summary plan description must *accurately reflect the contents of the plans* as of the date not earlier than 120 days prior to the date such summary plan description is disclosed." 29 C.F.R. § 2520.102-3 (Italics added)

If a plan contains fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, 29 U.S.C. § 1022 requires that notice of such authority be included in the summary plan description.

The record in this case reveals that the only discretionary authority accorded to the Central States Trustees is contained in the Trust Agreement - a document which is not routinely distributed to the plan participants. -

By justifying the utilization of the arbitrary and capricious standard of review of the Trustees' decision, based upon language in plan's Trust Agreement, it failed to recognize its own previous previously-drawn distinction between a "plan document" and a "plan for the purposes of holding its terms against a plan participant or beneficiary."

> The second problem with HCSC's use of the ASA is that it is not a "plan document" for purposes of holding its terms against a plan participant or beneficiary. [FN6] See, e.g., Local 56, United Food & Comm. Workers Union v. Campbell Soup Co., 898 F.Supp. 1118, 1136 (D.N.J.1995) ("A formal plan document is one which a plan participant could read to determine his or her *rights* or *obligations* under the plan."), citing Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995) (noting that

> one of ERISA's basic purposes was to afford employees the opportunity to inform themselves, "on examining the plan documents," of their *rights and obligations* under the plan), quoting H.R.Rep. No. 93-1280, at 297 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 5077, 5078. Fitcher v. Health Care Services Corporation,, 301 F.3d 811, 817. (7th Cir. 2002)

The Central States Trust Agreement does not inform the participants of rights and obligations; the Pension Plan and/or the Summary Plan Description serve these functions; not the Trust Agreement.

Pension plan participants should not have to pore through the Plan's foundation documents to determine if the Trustees have reserved unto themselves the authority in language which is not capable of being understood by the average participant, the discretion to deny benefit claims.

CONCLUSION

The writ should be granted in order that pension plan administrators not be licensed to accomplish through a hidden power granting them discretionary authority to interpret a plan that which they cannot do through plan amendment, that is, to renege on a promise to pay benefits under certain specified conditions and justify such conduct based upon a regulation which does not authorize it. Under no cricumstances should benefit suspension provisions which do not conform to the regulations implementing 29 USC § 1053(a) be condoned.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 02-3058

[Filed April 2, 2004]

Anthony J. Militello, Plaintiff-Appellant,	)
v.	)
Central States Southeast and Southwest Areas Pension Fund and The Board of Trustees of the Central States Southeast and Southwest Areas Pension Fund, Defendants-Appellees.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 01 C 2884.
Elaine E. Bucklo, Judge.

JUDGES: Before Hon. Kenneth F. Ripple, Circuit Judge, Hon. Terence T. Evans, Circuit Judge, Hon. Ann Claire Williams, Circuit Judge.

ORDER

On consideration of the petition for rehearing and rehearing en banc filed by counsel for Plaintiff Anthony J. Militello on March 17, 2004, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.

Accordingly, the petition for rehearing and rehearing en banc is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No. 02-3058

[Filed March 3, 2004]

ANTHONY J. MILITELLO,
Plaintiff-Appellant,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and THE BOARD OF TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 01 C 2884.
Elaine E. Bucklo, Judge.

JUDGES: Before RIPPLE, EVANS, and WILLIAMS, Circuit Judges.

OPINION

WILLIAMS, *Circuit Judge*. As a retired truck driver, Anthony J. Militello received pension benefits from the Central States, Southeast and Southwest Areas Pension Fund ("the Fund"). After learning that Militello ran his own trucking company, the Fund's Board of Trustees ("the Trustees") suspended his benefits and sent him a benefits denial letter. Militello sued both the Fund and the Trustees under the Employee Retirement Income Security Act ("ERISA") for unlawful suspension of benefits. The district court granted defendants' motion for summary judgment and Militello appeals.

We affirm, finding that the district court appropriately applied an "arbitrary and capricious" standard of review, the administrative record and denial letter were satisfactory and Militello received a "full and fair review." We further find that both federal regulations and the plan's language allow for suspension of benefits under these circumstances.

I. BACKGROUND

Anthony Militello participated in the Central States Southeast and Southwest Areas Pension Fund by virtue of his employment as a truck driver with Alco Express. After working at Alco Express for thirty-one years, he retired on March 24, 1996 at age fifty-three and promptly applied for pension benefits. Militello stated in a letter to the Fund that he owned trucks. A letter from Alco Express also indicated to the Fund that Militello owned trucks and that he did not have any control over the drivers or the equipment. Based on this information, the Fund approved Militello's application and began to pay him benefits on April 1, 1996.

On November 17, 1997, a representative from a local union informed the Fund that Militello owned and operated a trucking business that employed drivers. The Fund sent Militello a letter, indicating that it had received information that he was the "self-employed owner of a trucking company," and requesting his 1996 federal income tax returns and information regarding his day-to-day duties at the company. Militello replied that he had no duties or drivers and that he leased his equipment to American Motor Lines, which hired and paid the drivers. Because he did not submit a full copy of his tax returns, the Fund once again requested the returns. The Fund received the requested tax documents which revealed that in 1996, Militello listed his business as "Trucking," and spent almost $100,000 in fuel expenses and over $20,000 for a driver bonus. The Fund's Reemployment Committee determined that Militello's ownership of the trucking business constituted prohibited reemployment and gave Militello thirty days to terminate his ownership or face suspension of benefits.

Militello appealed the Reemployment Committee's decision to the Benefits Claim Appeals Committee ("BCAC") which affirmed, stating in part that "[t]he committee made its decision regarding your reemployment because work, in any capacity, requiring the same skills as those used by Fund participants while employed by contributing employers in the same metropolitan area in which you work is considered Prohibited Reemployment."

Militello appealed the BCAC's decision to the Trustees and the Trustees agreed with the earlier decisions, concluding that Militello was engaged in Prohibited Reemployment and that his retirement benefits would be suspended. The Pension Processing Department sent a letter to Militello informing him that he had received overpayment of benefits from April 1996

through August 1998, and that as a result, the $75,400 overpayment would be deducted from future benefits.

Militello brought suit against the Fund and the Trustees under ERISA, 29 U.S.C. § 1001 *et seq.*, for unlawful termination of pension benefits. On cross-motions for summary judgment, the district court entered judgment for the defendants, holding that the appropriate standard of review of the Trustees' decision was "arbitrary and capricious," the Trustees' decision to suspend Militello's benefits was not arbitrary and capricious, and the Fund could recoup the $75,400 in benefits paid. Militello appeals these determinations.

II. ANALYSIS

A. Standard of Review

Summary judgment is warranted only if there is "no genuine issue as to any material fact." *Fritcher v. Health Care Serv. Corp.*, 301 F.3d 811, 815 (7th Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). We review a grant of summary judgment de novo, viewing all facts and drawing all reasonable inferences in Militello's favor. *Id.*

We must first address whether the district court applied the correct standard of review to the Trustees' decision to suspend benefits. The standard of review depends on the amount of discretion that plan documents afford the plan administrator, in this case the Trustees.[1] *See Johnson v.*

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[1] The defendants assert that the Trustees are plan administrators of the Fund under 29 U.S.C. § 1002(16)(B). They argue in a short

Allsteel, Inc., 259 F.3d 885, 889 (7th Cir. 2001). A denial of benefits will be reviewed de novo "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989). If the plan confers discretionary authority, then a denial of benefits will be reviewed under an arbitrary and capricious standard. *See Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001).

We have designated the following phrase as safe harbor language that clearly gives the plan administrator broad discretionary power and thus ensures deferential review: "Benefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is entitled to them." *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331 (7th Cir. 2000). While this language ensures deferential review, that precise wording is not required. *See id.* (noting that "the courts have consistently held that there are no 'magic words' determining the scope of judicial review of decisions to deny benefits").

Here, Central States' trust agreement contains numerous references to the Trustees' broad discretion. For instance, Article V § 2 states that "Trustees are vested with discretionary and final authority in making all [plan-related]decisions, including Trustee decisions upon claims for benefits by participants and beneficiaries of the Pension Fund

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footnote that Militello's case against the Trustees should be dismissed because "[t]his court has repeatedly held that ERISA permits suits to recover benefits only against the plan as an entity." The defendants' underdeveloped argument, raised for the first time on appeal, does not convince us that dismissal is warranted.

and other claimants, and including Trustee decisions construing plan documents of the Pension Fund," and the plan makes clear that it incorporated the language of the trust agreement. *See* Pension Plan, Article VII § 7.01 ("[T]he Board of Trustees has authority to control and manage jointly the operation and administration of the Pension Fund and of this Pension Plan *in accordance with the terms of the Trust Agreement* and of this Pension Plan and amendments thereof. . . .") (emphasis added). Because the trust agreement's language confers substantially the same discretion as the safe harbor language discussed above, we find it sufficient to trigger the arbitrary and capricious standard of review. In light of this finding, we need not make an independent determination as to whether the language of the plan itself is sufficient to trigger this standard.[2]

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[2] Citing *Fritcher v. Health Care Service Corp.*, 301 F.3d 811 (7th Cir. 2002) and *Herzberger v. Standard Ins. Co.*, 205 F.3d 327 (7th Cir. 2000), Militello contends that the trust agreement is irrelevant because it is not a plan document under ERISA. Neither case supports Militello's position. In *Fritcher*, we ruled only that language in a "Benefit Booklet" did not compel deferential review, and that the "Administrative Services Agreement" at issue was not a "plan document" for purposes of divining the appropriate standard of review. *See* 301 F.3d at 816-17. In *Herzberger*, we said only that "employees are entitled to know what they are getting into" with respect to the standard of review. *See* 205 F.3d at 333. We note that trust agreements are mentioned in 29 U.S.C. § 1024(a)(6), (b)(2) & (b)(4), in conjunction with other items that are clearly plan documents. Morever, both this circuit and others have traditionally reviewed cases involving Central States' pension plan and its sister fund, the health and welfare plan, under the arbitrary and capricious standard. *See, e.g., Whisman v. Robbins*, 55 F.3d 1140, 1144 (6th Cir. 1995); *Exbom v. Central States, S.E. & S.W. Areas Health & Welfare Fund*, 900 F.2d 1138, 1142-43

Under the arbitrary and capricious standard, an administrator's decision will not be overturned if "(1) 'it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome,' (2) the decision 'is based on a reasonable explanation of relevant plan documents,' or (3) the administrator 'has based its decision on a consideration of the relevant factors that encompass important aspects of the problem.'" *Hess*, 274 F.3d at 461 (quoting *Exbom v. Central States, S.E. & S.W. Areas Health & Welfare Fund*, 900 F.2d 1138, 1142-43 (7th Cir. 1990)); *see also Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435, 1438 (7th Cir. 1996) ("Absent special circumstances such as fraud or bad faith, the Committee's decision may not be deemed arbitrary and capricious so long as it is possible to offer a reasoned explanation, based on the evidence, for that decision."). Additionally, because the standard of review is deferential, we "consider only the evidence that was before the administrator when it made its decision." *Hess*, 274 F.3d at 462; *see Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 981-82 (7th Cir. 1999).

B. The Trustees' Decision

1. The Administrative Record

The administrative record upon which the Trustees' decision was based is a major bone of contention between the parties. The tension is due in part to an affidavit submitted by Albert E. Nelson, Benefits Director for the Fund, in support of the summary judgment motion of the Fund and the

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(7th Cir. 1990). Militello has not provided us with a compelling reason to deviate from these cases.

Trustees, indicating that the Trustees' June 10, 1998 meeting minutes contain both an "agenda portion (consecutively bates stamped CS0001-04) and an attachments portion (consecutively bates stamped CS0005-75)." (Nelson Aff. of Jan. 31, 2002 ¶ 26.) According to Nelson, the attachments include the correspondence between the Fund and Militello, Militello's 1996 federal tax returns, and lease agreements between Militello and American Motor Lines. Militello argues that the administrative record should be limited to the agenda portion of the minutes, because the minutes make no reference to the attachments. He views Nelson's affidavit as an impermissible augmentation of the administrative record, and further contends that because Nelson is the Benefits Director and not a Trustee, Nelson is not qualified to testify about the record's contents.

Under the terms of the trust agreement, the Trustees are required to "make and maintain a record of the actions of the Trustees taken at any meeting thereof." (Article VI, § 3,CS 0231.) Nevertheless, we see no reason why Nelson, as Benefits Director for the Fund and a regular attendee of the Trustees' meetings, would not be qualified to testify to the contents of the administrative record and the nature of the Trustees' discussion. He has performed this function adequately in the past, *see Whisman v. Robbins*, 810 F. Supp. 936, 941 (S.D. Ohio 1992), *rev'd on other grounds*, 55 F.3d 1140 (6th Cir. 1995), and is specifically referenced in the minutes.[3]

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[3] "After a full discussion, a motion was made, seconded and unanimously carried, upon recommendation of Albert E. Nelson and Staff, to determine that the above-described employment of Anthony J. Militello by Anthony J. Militello Trucking is Prohibited Reemployment and that his retirement pension payments are to be suspended."

Moreover, the minutes suggest that the administrative record consisted of both an agenda section and an attachment section. The agenda section specifically acknowledges receipt of several documents in the "background" section, including Militello's tax returns and truck leases.[4] Additionally, the "action" portion of the agenda references a letter "to Mr. Militello from William J. Schaefer dated April 7, 1998 (attached page 28)."[5] In any event, Militello cannot have it both ways: although he complains that the attachments cannot be considered part of the record, he cites to certain attachments (namely, the leases) to bolster his claim that he was not running a trucking business. Therefore, we find no error in the district court's determination that the administrative record on appeal consists of both the agenda section and the attachments.[6]

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[4] In his reply brief, Militello argues for the first time on appeal that the Fund deleted letters that he submitted from the administrative record. We deem this argument waived. *See United States v. Feinberg*, 89 F.3d 333, 340-41 (7th Cir. 1996).

[5] Militello is quick to point out that the letter is not actually attached at page 28. However, as the letter is the twenty-seventh document following the minutes, we consider this to be a discrepancy of no consequence.

[6] Militello claims that based on *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 694 (7th Cir. 1992), the Trustees were required to "identif[y] each item considered . . . and include[ ] the Committee's assessment of that item and the weight given to it." This is not the rule set forth in *Halpin*. In that case, we merely explained that in *Brown v. Retirement Committee of Briggs & Stratton Retirement Plan, 797 F.2d 521, 535-36 (7th Cir. 1986)*, we determined that a denial letter alone did not comply with the statute. However, in *Briggs*, because the minutes of the meeting were attached to the letter, and because the minutes "identified each item considered"

After reviewing the entire record, it is clear that the Trustees' decision to suspend benefits cannot be characterized as arbitrary and capricious. Militello listed his business as "Trucking" on his tax returns and also described fuel expenses totaling nearly $100,000 and a driver bonus exceeding $20,000. Based on this information (which was consistent with the union representative's statement that Militello was running a trucking business that employed drivers), it was not unreasonable for the Trustees to determine that Militello was doing more than leasing.

Relying on the leases, Militello argues that he could not be running a trucking business. The leases state that the lessees shall "exercise the degree of control" required by the Department of Transportation ("DOT"). According to the DOT, lessees "shall have exclusive possession, control, and use of the equipment for the duration of the lease," and "shall assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. § 376.12(c)(1). However, in his briefs, Militello did not even attempt to explain how this language squares with his tax returns.[7]

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and "included the Committee's assessment of that item," the combination of the letter and the minutes revealed substantial compliance with 29 U.S.C. § 1133. *See Halpin, 962 F.2d at 694.* Moreover, we specifically noted in *Halpin*that "substantial compliance" with ERISA's regulations is all that is required. *Id.*

[7] Only at oral argument did Militello attempt to reconcile the DOT language with his 1996 tax returns by contending that his leases are "wet" leases as opposed to "dry," and that under the terms of a "wet" lease, the lessor pays fuel expenses and bonuses. Unfortunately for Militello, he has not pointed us to any language in the leases (or any other authority, for that matter) explaining the

2. Plain Language

Next, Militello insists that the Trustees' decision to suspend benefits is contrary to the plain language of the pension plan. Specifically, he alleges that nothing in the plan suggests that benefits can be suspended based on ownership of trucks.

We begin by examining the plan's language. The plan states that absent special circumstances not relevant here, a "Pensioner shall have his benefit payments suspended for any calendar month in which he works in 'Prohibited Reemployment.' " (Pension Plan § 4.13(a)). Prohibited Reemployment is defined as

> [e]mployment in any position, including a managerial or supervisory position and including self-employment, but not including government employment, either in the same industry in which the Participant or Pensioner earned any Contributory Service Credit while covered by the Pension Fund, or in any other industry if the Participant or Pensioner is in the same job classification as are other Participants then employed by a Contributing Employer located within the same standard metropolitan statistical area.

(Pension Plan § 4.13(f)(3)).

Based on this language, we agree with Militello that nothing in the plan allows the Trustees to bar him from owning trucks if he wants to keep his pension. However,

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difference between "wet" and "dry," and his argument comes too late.

Militello's benefits were not suspended merely because he owned trucks; indeed, the Fund was told that he owned and leased trucks when it initially approved his request for benefits. Militello's funds were suspended because the Fund determined that he owned and operated a trucking business employing drivers. It was not contrary to the plan's plain language for the Trustees to determine that owning a trucking business that employed drivers violated the plan's prohibition against managing employees, supervising employees, or engaging in self-employment in the trucking industry.

3. The Denial Letter

Militello also has numerous procedural complaints. For instance, he alleges that the benefits denial letter issued by the Trustees does not satisfy statutory and regulatory requirements. ERISA dictates that specific reasons for denial be communicated to the claimant. *See* 29 U.S.C. § 1133(1) ("[E]very employee benefit plan shall — (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim. . . ."); 29 C.F.R. § 2560.503-1(g)(1).[8] "Although the

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[8] According to the regulation, "the notification shall set forth, in a matter calculated to be understood by the claimant — (i) The specific reason or reasons for the adverse determination; (ii) Reference to the specific plan provisions on which the determination is based; (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;

applicable regulations are specific in pronouncing the requirements, strict compliance is not mandated. . . . Rather, substantial compliance with the regulations is sufficient. . . ." *Tolle v. Carroll Touch, Inc.*, 23 F.3d 174, 180 (7th Cir. 1994) (citations omitted).

In this case, the Trustees' denial letter stated that Militello was not eligible "to receive pension benefits for any period that [he is] the owner of Anthony Militello Trucking," and that the Trustees made this decision because "work, in any capacity, requiring the same skills as those used by Fund participants while employed by contributing employers in the same metropolitan area in which you work is considered Prohibited Reemployment." The letter also indicated that in order to avoid the suspension of benefits, Militello must "provide documentation verifying that [he] no longer ha[d] any ownership in the Anthony Militello Trucking Company" in the next thirty days. (Compl. Ex. B-1.) Furthermore, it cited the specific plan provision Militello had allegedly violated.

The district court properly determined that this letter satisfied statutory and regulatory requirements. The letter indicated, "in a manner calculated to be understood by the participant," that the Trustees found Militello ineligible for pension benefits because his actions as owner of Anthony Militello Trucking constituted prohibited reemployment. Although the letter is sparse, the Trustees were required to give only specific reasons, not "the reasoning behind the reasons." *Gallo v. Amoco Corp.*, 102 F.3d 918, 923 (7th Cir.1996) ("All [the plan administrator] has to give the

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(iv) A description of the plan's review procedures and the time limits applicable to such procedures . . . ."

applicant is the reason for the denial of benefits; he does not have to explain to him why it is a *good* reason. To require that would turn plan administrators not just into arbitrators, for arbitrators are not usually required to justify their decisions, but into judges, who are.") (emphasis in original).

4. Full and Fair Review

Militello argues that his claim was not afforded a "full and fair review" for three reasons: (1) he was denied a step in the appeal process articulated in the plan; (2) the Trustees applied a non-uniform interpretation of the plan in rejecting Militello's claim; and (3) the Trustees failed to adequately explain their decision.

With respect to Militello's first contention, we agree that the Fund did not follow the plan's provisions to the letter. The plan outlines a three-step appeal procedure for the review of any claim that has been denied: (1) review by the Benefits Claim Review Committee (the "Review Committee"), (2) review by the BCAC, and (3) review by the Board of Trustees. Militello's case took a different route. The Reemployment Committee, which is not mentioned in the plan, initially decided to suspend Militello's pension benefits. Militello was then allowed to appeal to the BCAC, and finally to the Trustees. Thus, Militello was only allowed two appeals.[9]

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[9] The Fund defends this procedural irregularity on the ground that the Reemployment Committee "is more qualified than Central States' Staff or the [Review Committee] to handle Prohibited Reemployment claims. For all practical purposes, the Reemployment Committee is the functional equivalent of the[Review Committee]." Appellees' Br. at 25 (citations omitted).

We are troubled by the Fund's inability to follow its own rules. Nevertheless, we have stated that

> [t]he persistent core requirements of review intended to be full and fair include knowing what evidence the decision-maker relied upon, having an opportunity to address the accuracy and reliability of that evidence, and having the decision-maker consider the evidence presented by both parties prior to reaching and rendering his decision.

Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 689 (7th Cir.1992) (quoting *Brown v. Ret. Comm. of Briggs & Stratton Ret. Plan*, 797 F.2d 521, 534 (7th Cir. 1986)). Militello does not complain (at least not in his initial brief[10]) that the failure of the Fund to follow its appeal procedures deprived him of any of these "core requirements." Thus, we cannot say that failure to follow the appeal process to the letter, without more, necessarily deprived Militello of full and fair review. *Cf. Buttram v. Central States, S.E. & S.W. Areas Health and Welfare Fund*, 76 F.3d 896, 901 (8th Cir. 1996) ("Although the procedural irregularities in this case [which included failure to provide written notice of claim denial, the absence of a second-level appeal, and a seven year gap between application of benefits and a third-level appeal]give us pause, they do not demonstrate that the actual decision reached . . . was arbitrary or whimsical.").

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[10] We note that Militello has again raised new arguments in his reply brief. To the extent that Militello's arguments were not set forth in his initial brief, we will not address them here. *See Feinberg*, 89 F.3d at 340-41.

We next address Militello's assertion that the Trustees applied a non-uniform interpretation of the plan. To buttress this claim, he points to his submission of a letter to the Fund stating the following: "The letter being written requesting approval of My retirement after 31 years of service, with the right to retain My equipment. This request being previously approved is now being denied." Militello's argument is not compelling. All that is alleged in these two statements is that Militello was aware that the Fund was taking action to suspend his pension benefits; the letter does not show that the Trustees applied a non-uniform interpretation to Militello as opposed to other claimants. Rather, the record suggests that the Fund's understanding of Militello's situation had changed; the Fund believed that he was operating a trucking business rather than simply owning and leasing trucks. Based on these changed circumstances, the Fund was entitled to take action, including reversal of an earlier decision to grant benefits. Put simply, a reversal based on new information is not a non-uniform interpretation.[11]

We finally turn to Militello's contention that the Trustees failed to explain their reasons for suspension, thus denying him the opportunity to challenge the decision adequately. Specifically, he claims that the Trustees never explained what "skill" he was using that violated the plan's reemployment rules. As we stated earlier, we find that the Trustees alerted

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[11] Militello contends that the Fund was required to demonstrate uniformity by pulling similar cases from its files. While such thoroughness on the Fund's part would certainly have been appreciated, Militello cites no persuasive authority for this proposition. 29 C.F.R. § 2560.503-1(b)(5), the regulation upon which Militello relies, does not impose a blanket requirement for pension funds to provide data on all related cases every time it denies benefits.

Militello to the fact that they believed his ownership of a trucking business violated the plan. Militello was thus equipped to challenge their decision.[12]

5. 29 C.F.R. § 2530.203-3

Militello argues that 29 C.F.R. § 2530.203-3 precludes the Fund from suspending pension benefits due to self-employment. He fails to consider part (a) of the regulation which specifically excludes claimants who have not attained normal retirement age from its protection:

> A plan may provide for the suspension of pension benefits which commence *prior to the attainment of normal retirement age*, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for *any re-employment and without regard to the provisions of section 203(a)(3)(B) and this regulation* to the extent (but only to the extent) that suspension of such benefits does not

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[12] Militello contends that Nelson's affidavit offers a *post hoc* rationalization of the Trustees' decision. Nelson's affidavit gives more of the "reasoning behind the reasons," intimating that the Trustees arrived at their decision largely based upon Militello listing "Trucking" as his type of business on his tax returns, and the payment of fuel expenses and a driver bonus. However, this additional explanation is permissible under *Gallo* because Nelson does not introduce new facts and his explanation is consistent with the Trustees' decision. *See Gallo*, 102 F.3d at 923 ("When challenged in court, the plan administrator can defend his interpretation with any arguments that bear upon its rationality," although he is prohibited from "augment[ing] the administrative record with new facts bearing upon the application for benefits. . . .").

> affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof.

29 C.F.R. § 2530.203-3(a) (emphasis added); *see also Whisman*, 55 F.3d at 1146-47.

Militello retired at age fifty-three; now sixty-one years old, he has still not attained the normal retirement age, which is defined as sixty-five in the plan. Therefore, this regulation does not pertain to Militello, and we easily dispose of his claim.[13]

III. CONCLUSION

For the foregoing reasons, the district court's decision is AFFIRMED.

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[13] Finally, Militello argues that the Fund is not entitled to recoupment of benefits already paid because he "was never provided with an opportunity to appeal the decision to seek recoupment, an issue which was not addressed in the administrative process." Not only did the district court consider this argument waived, but on appeal, Militello does not cite to the record, a case, a statute, or a regulation in his two-sentence argument in his initial brief. Not surprisingly, we consider his claim waived as well. *See Tyler v. Runyon*, 70 F.3d 458, 465 (7th Cir. 1995).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 01 C 2884

[Filed July 11, 2002]

ANTHONY J. MILITELLO,	)
Plaintiff,	)
	)
v.	)
	)
CENTRAL STATES SOUTHEAST AND	)
SOUTHWEST AREAS PENSION FUND and	)
THE BOARD OF TRUSTEES OF THE	)
CENTRAL STATES SOUTHEAST AND	)
SOUTHWEST AREAS PENSION FUND,	)
Defendants.	)
	)

JUDGE: Elaine E. Bucklo, United States District Judge.

MEMORANDUM OPINION AND ORDER

Anthony Militello was a truck driver whose employer made pension contributions to Central States Southeast and Southwest Areas Pension Fund ("the Fund"), a multi-employer pension plan as defined by ERISA, 29 U.S.C. §§ 1002(2)(A) and (37). The Fund terminated Mr. Militello's

benefits and sought repayment of benefits paid when it determined that he was engaged in "prohibited reemployment" under the pension plan. Mr. Militello sues the Fund under ERISA, challenging the denial of benefits as an unlawful and nonuniform interpretation of the pension plan. The Fund moves for summary judgment, and Mr. Militello brings a cross-motion. I grant the Fund's motion and deny Mr. Militello's.

I.

Mr. Militello was a truck driver at Alco Express until he retired in 1996, for health reasons, at age 53. Alco Express contributed to the Fund on Mr. Militello's behalf, and when Mr. Militello retired, he sought pension benefits from the Fund. Mr. Militello told the Fund that he was retiring from active driving but that he owned trucks and trailers. Admin. Record at CS 0009.[1] The pension plan provided for suspension of pension benefits for any pensioner engaged in "prohibited reemployment," § 4.13(a), which is defined to include "[e]mployment in any position, including a managerial or supervisory position and including self-employment, . . . in the same industry in which the Participant or Pensioner earned any Contributory Service Credit while covered by the Pension Fund." § 4.13(g)(3). Alco Express advised the Fund that Mr. Militello owned equipment that he leased to a trucking company, but stated that he did not have any control over the drivers of the equipment. CS 0033. The Fund granted his request for pension benefits and began paying $2,600 per month effective April 1, 1996.

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[1] Citations to the administrative record appear in the following form: "CS __."

In November 1997, the Fund was told by a local union representative that Mr. Militello was running a non-union trucking business and that he employed his son as a driver. The Fund investigated, told Mr. Militello that he had been accused of being the self-employed owner of a trucking company, and asked him to provide information about the company and a complete copy of his 1996 federal income tax returns. CS 0069. Mr. Militello responded that he had no day-to-day duties, and that he leased all of his trucks to a company called American Motor Lines, which paid and hired all of the drivers. CS 0068. Mr. Militello submitted copies of lease agreements with American Motor Lines, several of which stated that American Motor Lines, as lessee, would be responsible for hiring drivers. CS 0013, CS 0016-21. Mr. Militello's federal tax returns listed business income and expenses for a principal business described as "trucking" and with the business name of "Anthony Militello." CS 0047. Included among the expenses were $98,792 for "fuel" and $21,390 for a "driver bonus." CS 0048. The Reemployment Committee of the Fund concluded that Mr. Militello had engaged in prohibited reemployment as the owner of Anthony Militello Trucking, based on the determination that he was engaged in work using the same skills that he had used while working for a contributing employer. CS 0035. The Fund advised him that his benefits would be suspended if he did not terminate his employment with Anthony Militello Trucking within 30 days. *Id.*

Mr. Militello appealed to the Benefits Claim Appeals Committee, which affirmed the decision of the Reemployment Committee, stating that his ownership of Anthony Militello Trucking was prohibited reemployment. CS 0032. Mr. Militello exhausted his administrative appeals by taking his claim before the Board of Trustees. The Board of Trustees also concluded, based on all of the information submitted,

which included Mr. Militello's tax returns, that his ownership of Anthony Militello Trucking was prohibited reemployment. CS 0003-04. Mr. Militello sues under ERISA, 29 U.S.C. § 1001 *et seq.*, claiming that the suspension of his benefits and the Fund's attempt to recover overpayment of benefits is unlawful.

II.

Both parties move for summary judgment, which is proper only when the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, I must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). On cross-motions for summary judgment, I give separate consideration to the evidence of each party and the inferences to be drawn from it. *See Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998).

The default standard of review for a denial of pension benefits is *de novo,* but "[w]here the plan gives the administrator discretion to interpret the plan terms or determine benefits eligibility courts review the denial of benefit claims under ERISA, 29 U.S.C. § 1132(a)(1)(B), using the arbitrary and capricious standard." *Carr v. Gates Health Care Plan*, 195 F.3d 292, 294 (7th Cir. 1999) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)).

There are no "magic words" necessary to trigger this deferential review, but the plan must "make reasonably clear

that the plan administrator is to exercise discretion." *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331 (7th Cir. 2000). Here the pension plan gives the Board of Trustees the authority to administer the trust in accord with the Trust Agreement, Plan § 7.01, which states that "[t]he Trustees are vested with discretionary and final authority in construing plan documents of the Pension Fund." Trust Agreement Art. IV § 17. I previously held that this language was sufficient to trigger deferential review, *see* Minute Order of Jan 14, 2002, and noted that, although Mr. Militello "d[id] not concede" that deferential review was appropriate, he had provided no basis for concluding otherwise. He now argues that *de novo* review is appropriate because the Fund's trustees failed to exercise their discretion because their decision was conclusory, contained no analysis, and merely rubber-stamped the decision of the Benefits Claim Appeals Committee. He cites *Gritzer v. CBS, Inc.*, 275 F.3d 291 (3d Cir. 2002), but there the administrator had never even issued a decision, so court held that, where there was no analysis at all to which it could defer, the plan administrator had forfeited the right to use its discretion. *Id.* at 295-96. Here, however, where there was an exercise of discretion, Mr. Militello must demonstrate that it was exercised arbitrarily and capriciously.

Under the arbitrary and capricious standard,

> a plan administrator's decision should not be overturned as long as (1) "it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome," (2) the decision "is based on a reasonable explanation of relevant plan documents," or (3) the administrator "has based its decision on a consideration of the relevant factors that encompass the important aspects of the problem."

Hess v. Hartford Life & Acc. Ins. Co., 274 F.3d 456, 461 (7th Cir. 2001). Where an application was given genuine consideration, deferential review "is limited to the evidence that was submitted in support of the application for benefits, and the mental processes of the plan's administrator are not legitimate grounds of inquiry . . . ." *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 982 (7th Cir. 1999).

III.

I begin with the Fund's motion. Mr. Militello argues that the suspension of his benefits was based on an unlawful and nonuniform interpretation of the pension plan in violation of 29 U.S.C. § 1132(a)(1)(B), that he was not provided adequate notice of the reasons for his suspension under 29 U.S.C. § 1133(1), and that the suspension of his benefits violated 29 U.S.C. § 1053.

A.

Under § 1132(a)(1)(B), I must determine whether the Fund's determination that Mr. Militello was engaged in "prohibited reemployment" under § 4.13(g) was reasonable and supported by the evidence in the administrative record. The Fund was informed by a local union that Mr. Militello was operating a trucking company and that he employed his son as a driver. Mr. Militello denied that he did anything more than lease vehicles to a third party, and he provided copies of the lease agreements, but his tax returns showed that he paid nearly $100,000 for fuel and more than $20,000 as a "driver bonus." CS 0048.

Mr. Militello argues that this was an inconsistent and "nonuniform" interpretation because it reversed the Fund's

previous determination that mere ownership of his trucks was "ok to accept for [the] purpose of retirement." CS 0033. A nonuniform interpretation may be arbitrary and capricious, *see Russo v. Health, Welfare & Pension Fund, Local 705, Int'l Bhd. of Teamsters*, 984 F.2d 762, 766 (7th Cir. 1993), but here the facts, as known by the Fund, had changed. When Mr. Militello applied for pension benefits, the Fund only knew that he owned the vehicles and was leasing them, but was told that he did not exercise any control over the drivers. CS 0033. The Fund reasonably concluded, on the basis of the information from the local union and Mr. Militello's tax return, that he was actually operating a trucking business and paying drivers. If he had been leasing the trucks to another company that operated them, he would not have incurred anything in driver expenses or much at all in the way of fuel expenses. Even if he was not driving the trucks himself, management of a trucking business would qualify as "prohibited reemployment" under § 4.13(g) of the pension plan. The Fund's reversal of its prior determination was not a "nonuniform" interpretation.

Mr. Militello argues that the information from the local union was hearsay, but "[a] pension or welfare fund trustee or administrator is not a court [and] is not bound by the rules of evidence." *Karr v. National Asbestos Workers Pension Fund*, 150 F.3d 812, 814 (7th Cir. 1998). He also argues that the Fund improperly requested and considered his personal income tax returns. Department of Labor regulations for 29 U.S.C. § 1053 provide that "[a] plan may provide that an employee must notify the plan of any employment. A plan may request from an employee access to reasonable information for the purpose of verifying such employment." 29 C.F.R. § 2530.203-3(b)(5). Mr. Militello cites an agency discussion of this regulation, Department of Labor, *Rules and Regulations for Minimum Standards for Employee Benefit*

Plans; Suspension of Benefit Rules, 46 Fed. Reg. 8894, which states that the Department of Labor would not consider a request for a complete copy of a personal income tax returns to be "reasonable." *Id.* at 8902. This is an informal agency interpretation of a regulation. Agency rules and regulations with the force of law are entitled to deference, but

> informal agency interpretations such as those contained in "opinion letters . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." Nevertheless, given the specialized experience and broader information available to such an agency, these informal interpretations are "entitled to respect" to the extent that they have the "power to persuade."

American Fed'n of Gov't Employees v. Rumsfeld, 262 F.3d 649, 656 (7th Cir. 2001) (citations omitted).

Mr. Militello argues that this discussion makes the Fund's request for and consideration of his personal income tax return unlawful. However, even if I deferred to the Department of Labor's point of view, the discussion in its entirety does not support Mr. Militello's position. The Department of Labor states that it would be unduly intrusive to ask for a personal income tax return, which mostly contains information that is irrelevant to verification of employment, when the administrator could easily get the same information from tax withholding statements without considerable expense of resources. 46 Fed. Reg. at 8902. Here the allegation was that Mr. Militello was self-employed and received no wages, so there would be no tax withholding statements. Under the circumstances, his personal tax returns contained highly relevant information, which could not have otherwise

obtained without imposing an inordinate burden on the Fund. The intrusion on Mr. Militello's privacy was not unreasonable. The Fund reasonably requested and considered his personal tax returns to determine whether he was engaged in "prohibited reemployment."

Mr. Militello also argues that Fund did not specify what portion of the expenses on his 1996 tax returns, if any, were attributable to prohibited employment that began, at the earliest, when he retired in April of 1996. However, even if I credit Mr. Militello's argument, which seems to be that those expenses were attributable to pre-retirement employment, it was not unreasonable to view the tax returns, which reflected more than $120,000 of expenses suggesting that he was actually operating a trucking business, as establishing prohibited employment after April 1996.

Finally, Mr. Militello argues that the Fund ignored the evidence that he provided that showed that he was *not* employed in the trucking business. For example, he says that his tax returns demonstrated that he paid no wages or salaries,[2] and he produced leases, some of which imposed the responsibility of hiring and paying drivers on the lessee, American Motor Lines. But arguments about the sufficiency of the evidence cannot demonstrate arbitrariness or capriciousness where there is evidence in the record that supports the plan administrator's reasons. *See Exbom v. Central States, S.E. and S.W. Areas Health and Welfare Fund*, 900 F.2d 1138, 1144 (7th Cir. 1990) (holding that

---

[2] The Fund argues that he actually left these spaces blank on his tax returns, rather than filling in "zero," and that he does not actually show that he paid *no* wages. Taken in the light most favorable to Mr. Militello, however, this is evidence that he paid no wages or salaries.

existence of conflicting evidence in record was not reason to find plan administrator's decision, which was supported by other evidence in record, was arbitrary and capricious). I cannot reweigh the evidence where the record supports the Fund's decision as reasonable. *See* id. The Fund's interpretation of the plan and its decision that Mr. Militello was operating a trucking business as well as its conclusion that the business constituted "prohibited employment" were not arbitrary and capricious.

B.

ERISA requires every employee benefit plan to provide notice of a denial of benefits, "setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant." § 1133(1). The regulations interpreting this statute require a notice of adverse benefit determination to include:

> (i) The specific reason or reasons for the adverse determination;
>
> (ii) Reference to the specific plan provisions on which the determination is based;
>
> (iii)A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;
>
> [and]
>
> (iv)A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the

> claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review . . . .

29 C.F.R. § 2560.503-1(g)(1). Mr. Militello argues that he did not receive this notification as soon as the Fund received the information from the local union, but the statute and regulation require that he receive notice of an adverse *determination,* not of the commencement of the investigation. The February 5, 1998, letter notifying Mr. Militello of the Reemployment Committee's decision to suspend his benefits, CS 0035, conformed to these requirements.

All of the Fund's decisions stated that the reason they were suspending Mr. Militello's benefits was that his ownership of Anthony Militello Trucking constituted "prohibited reemployment" because it was work, "in any capacity," using the same skills in the same metropolitan area as he did when he was employed, and that to prevent the suspension, he would have to give up his ownership of Anthony Militello Trucking. *See* CS 0035, 0032, 0002-04. Mr. Militello argues that, because none of the Fund's decisions specifically refer to his tax returns, or to the specific evidence that the Fund considered in reaching this conclusion, the Fund did not provide the "specific reasons" required by § 1133(1). The justification based on the tax return, he says, is a "post hoc attempt to furnish a rationale" for the denial of his benefits. *See Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 696 (7th Cir. 1992). In *Halpin,* the administrator's letter simply stated that the pensioner was no longer totally disabled, but did not explain why. *Id.* at 692. The court held that this was a "[b]are conclusion[]" that was insufficiently specific to provide the administrator's rationale. *Id.* at 693. The court also said that "the sending of the file, without sufficient indication of what parts of the file the

[administrator] relied on or rejected, does not repair the inadequacy."

Here, however, there was no inadequacy to repair. The Fund's decisions state both a conclusion--that Mr. Militello was engaged in "prohibited reemployment"—and a reason—that he was employed as the owner of Anthony Militello Trucking. "The administrator must give the 'specific reasons' for the denial, but that is not the same thing as the reasoning behind the reasons, in this case, the interpretive process that generated the reason for the denial." *Gallo v. Amoco Corp.*, 102 F.3d 918, 922 (7th Cir. 1996) (citations omitted). Although the Fund cannot introduce new facts, outside the administrative record, to justify the decision, it can "defend [its] interpretation with any arguments that bear on its rationality." *Id.* at 923. The Fund does not introduce new facts; it merely points to the evidence in the administrative record that supports its reason for suspending benefits. Mr. Militello says that he was not provided with the administrative record at the time of the denial, but the Fund "is not limited to repeating what [it] told the applicant." *Id.* Specific reasons must be supplied so that the applicant can adequately challenge the decision, *Halpin*, 962 F.2d at 689; *Gallo*, 102 F.3d at 923, and Mr. Militello was able to do so here.

The Fund has a three-step administrative process for benefits claims: step one is review by the Benefits Claim Review Committee, Step two is by the Benefits Claim Appeals Committee, and step three is by the Board of Trustees. Pension Plan App. B, at CS 0158. Mr. Militello says that he was denied review at the initial level because his claim was heard by the Reemployment Committee, not the Benefits Claim Review Committee. In reply, the Fund submits an affidavit of Albert E. Nelson, its Benefits

Director, in which he states that the Reemployment Committee is the "functional equivalent" of the Benefits Claim Review Committee, but it is more specialized. Reply Ex. A ¶ 9. Mr. Militello objects that this is new evidence introduced in reply, but the Fund introduced it to rebut Mr. Militello's claim that he had been denied access to the first step of the administrative process. *See Beck v. University of Wisc. Bd. of Regents*, 75 F.3d 1130, 1134 n.* [sic] (7th Cir. 1996) ("'[W]here the reply affidavit merely responds to matters placed in issue by the opposition brief and does not spring upon the opposing party new reasons for the entry of summary judgment, reply papers—both briefs and affidavits—may properly address those issues.'"). His objection did not include any evidence to rebut the facts in Mr. Nelson's reply affidavit, so I take those facts as true for the purpose of the Fund's motion.

Mr. Militello also objects to the affidavit of Mr. Nelson offered in support of the Fund's motions, but mostly he disputes the effect of the evidence, rather than Mr. Nelson's competence to offer it. He does object to Mr. Nelson's designation of the "record on review," arguing that it is not a matter within Mr. Nelson's personal knowledge, but as Benefits Director, he is the custodian of the records and documents maintained in the applications of pension benefits, Ex. A ¶ 5, and he states that the record that he attaches is "a true and accurate copy of the Minutes of the Pension Group Trustees' meeting of June 10, 1998," *id.* ¶ 26. Mr. Militello submits certain other documents which his attorney says were found in the Fund's files, but he submits no basis for determining that those additional documents were part of the minutes of the Trustees' meeting. I conclude that Mr. Nelson is competent to testify about the contents of the administrative record, and I accept the Fund's version of the "record on review." *See Whisman v. Robbins*, 810 F. Supp. 936, 941

(S.D. Ohio 1992), *rev'd on other grounds*, 55 F.3d 1140 ("[T]he Nelson affidavit demonstrates that he is in a position to verify what evidence was actually considered by the Trustees when they reached their decision to suspend [the applicant]'s retirement benefits."). Mr. Militello's motions to strike the affidavits of Mr. Nelson are denied, and his procedural claims are without merit.

C.

Finally, Mr. Militello argues that the suspension of his benefits violates 29 U.S.C. § 1053, which states that "each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." § 1053(a). Mr. Militello admits that the "normal retirement age" is sixty-five, *see* Resp. to Stmt. of Facts. ¶ 16, and that he was only fifty-three when he retired in 1996, *id.* ¶ 20. On its face, then, § 1053 does not apply to Mr. Militello because he has not attained normal retirement age. *See Whisman v. Robbins*, 55 F.3d 1140, 1146 (6th Cir. 1995) ("[W]ithout running afoul of § [1053](a), Central States need not have placed any conditions on the forfeiture of benefits for participants who become reemployed prior to reaching normal retirement age."); *Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430, 1440-41 (S.D.N.Y. 1983) (holding that neither 29 U.S.C. § 1053(a) nor 29 C.F.R. § 2530.203-3(c) applies to early retirement benefits for applicants who have not reached normal retirement age). I therefore need not consider Mr. Militello's argument that self-employment is not a basis for suspension of benefits under 29 C.F.R. § 2530.203-3(c)(2) because it speaks of "service," which is elsewhere defined as "performance of duties for the employer."

IV.

Mr. Militello's motion for summary judgment raises identical arguments, save one, to those he raises in his response to the Fund's motion. Because I conclude that, even viewing the facts in the light most favorable to him, he cannot prevail on those arguments, he cannot possibly meet the standard for summary judgment in his favor.

I consider separately his argument that the Fund may not recoup the $75,400 in benefits paid to him during his prohibited reemployment. He argues that recoupment is unlawful because it does not comply with 29 C.F.R. § 2530.203-3(b)(5). First, he does not explain this argument at all in his motion, so he has waived it. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived."). Even if I consider the argument, however, § 2530.203-3(b)(5) provides no assistance. That section states the procedure for requiring verification of employment status and for the forwarding of benefits withheld pending the receipt of verification, "except to the extent that payments may be withheld and offset pursuant to other provisions of this regulation." The offset sought by the Fund from payments that Mr. Militello will receive in the future is unrelated to benefits withheld pending verification; it is to compensate for benefits paid in error during Mr. Militello's period of "prohibited reemployment." The pension plan provides that the failure to notify the Fund of reemployment obligates the pensioner to repay any benefits received during the period of "prohibited reemployment." Pension Plan § 4.13(c), (m). The Fund may offset future benefit payments by the amount of benefits collected during a period of prohibited reemployment. *See* 29 C.F.R. § 2530.203-3(b)(3). The offset

is appropriate, so Mr. Militello's motion for summary judgment is denied.

V.

I GRANT the Fund's motion for summary judgment, and DENY Mr. Militello's motion for summary judgment. Mr. Militello's motion to strike the affidavit of Mr. Nelson is DENIED.

ENTER ORDER:

Elaine E. Bucklo
United States District Judge

Dated: July 10, 2002

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. Accordingly, judgment is entered in favor of defendants and against plaintiff.

Date: 7/10/2002

APPENDIX D

Foldout Exhibit

Letter from Anthony Militello to Teamsters Union,
Dated March 30, 1996

March 30, 1996

To: Teamsters Union
From: Anthony Militello

Subject: Truck ownership / Retirement

Dear Sirs,

I was recently informed by the Teamsters Union that I would not be able to Retire Because of my ownership of several trucks and trailers.

I have been a member of the Teamsters Union for thirty one years. Recently my health has been failing. I have extremely high blood pressure and have also been diagnosed with blood sugar that has effected my vision and my extremities (legs and feet).

I recently took my medical exam for driving and I failed. I waited thirty days and failed it again. Upon the advice of my Doctor, I have decided to Retire from active driving.

I was advised by the Union that, to receive my pension I must seek your approval to actively own trucks and receive a pension.

The dissolution and forced sale of my equipment at this particular time would be financial ruin for myself and family. My health problems at this time were uncomfortable. So I am asking the Union Board to allow me to retire from the Teamsters,to receive my union retirement benefits and to allow me to continue to own my trucks, until such a time that I might be able to sell them without financial loss or hardship to me and my family.

If there are any questions regarding this matter, please do not hesitate to call me at:
810/ 772-1886

Thank you in advance,
Anthony Militello

APR 0 8 1996
W.
PENSION BENEFITS
DIVISION

Supreme Court, U.S.
FILED
JUL 30 2004
OFFICE OF THE CLERK

No. 04-7

IN THE

Supreme Court of the United States

ANTHONY J. MILITELLO,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES P. CONDON *
FRANCIS J. CAREY
CHARLES H. LEE
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QUESTIONS PRESENTED

1. Whether Petitioner, Anthony J. Militello, waived his argument that Respondent, Central States, Southeast and Southwest Areas Pension Fund, violated the "anti-cutback" rule of the Employee Retirement Income Security Act of 1974 ("ERISA"), because he failed to raise it in the lower courts.

2. Whether the Seventh Circuit correctly held that 29 U.S.C. § 1053(a) and 29 C.F.R. § 2530.203-3 do not apply to claimants who have not attained normal retirement age.

3. Whether the Seventh Circuit correctly relied on the Central States, Southeast and Southwest Areas Pension Fund's Trust Agreement in holding that the Trustees' decision to suspend Mr. Militello's benefits should be reviewed under the arbitrary and capricious standard.

PARTIES TO THE PROCEEDING

Petitioner

Anthony J. Militello is a retired participant of the Central States, Southeast and Southwest Areas Pension Fund.

Respondents

Central States, Southeast and Southwest Areas Pension Fund is a multi-employer pension plan as defined by ERISA, 29 U.S.C. §§ 1002(2)(A) and 1002(37).

The Board of Trustees of the Central States, Southeast and Southwest Areas Pension Fund is the plan sponsor of the Central States, Southeast and Southwest Areas Pension Fund within the meaning of ERISA, 29 U.S.C. § 1002(16)(B).

CORPORATE DISCLOSURE STATEMENT

Respondents do not have parent corporations and no public company owns stock in any Respondent.

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PERTINENT STATUTES AND REGULATIONS

29 U.S.C § 1053(a) provides, in pertinent part, as follows:

> (a) Nonforfeitability Requirements.—Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . . .

29 U.S.C. § 1053(a)(3)(B) provides, in pertinent part, as follows:

> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—
>
> * * * * *
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

29 C.F.R. § 2530.203-3(a) provides, in pertinent part, as follows:

> (a) General. Section 203(a)(3)(B) [29 U.S.C. § 1053(a)(3)(B)] of the Act provides that the right to the employer-derived portion of an accrued pension benefit shall not be treated as forfeitable . . . This section sets forth the circumstances and conditions under which such benefit payments may be suspended. A plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for any reemployment and without regard to the provisions of section 203(a)(3)(B) and this regulation to

the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof.

IN THE

Supreme Court of the United States

ANTHONY J. MILITELLO,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Facts Upon Which Mr. Militello's Pension Benefits Were Suspended.

Petitioner, Anthony J. Militello ("Mr. Militello"), was a participant of the Central States, Southeast and Southwest Areas Pension Fund ("Central States") by virtue of his employment as a truck driver at Alco Express, a contributing employer to Central States. In March 1996, Mr. Militello retired from Alco Express at age 53 and applied for pension benefits from Central States. (Record ("R.") 36, ¶ 20.) In support of his application, Central States was told that Mr. Militello was retiring from active driving but that he owned several trucks and trailers which were leased to a trucking company. (R. 36, ¶ 21; R. 21, ¶ 16.) Central States was also

told that Mr. Militello did not have any control over the drivers of the leased trucks. (R. 36, ¶ 21; R. 21, ¶ 16.) Based on this information, Central States approved Mr. Militello's pension application and began to pay him retirement benefits in the amount of $2,600.00 per month effective April 1, 1996. (R. 24, ¶ 22; R. 21, ¶ 19.)

On November 17, 1997, Central States was told by a representative of a local union that Mr. Militello was operating a trucking business which employed truck drivers. (R. 24, Ex. 3 to Ex. A, CS0002, CS0070; R. 21, ¶ 21.) Since the Central States Pension Plan (the "Pension Plan") provides for the suspension of benefits in certain instances of reemployment, Central States investigated this allegation. (R. 24, Ex. 3 to Ex. A, CS0002, CS0069.) Central States advised Mr. Militello that it was alleged that he was the self-employed owner of a trucking company and requested that he provide information about his trucking business. (R. 24, Ex. 3 to Ex. A, CS0069.) Specifically, Mr. Militello was asked to provide a statement describing his day to day duties at the trucking company, whether he performed any driving duties, and whether he employed drivers. (R. 24, Ex. 3 to Ex. A, CS0069.) Mr. Militello was also asked to provide a copy of his 1996 Federal Income Tax Return. (R. 24, Ex. 3 to Ex. A, CS0069.) In response to Central States' inquiries, Mr. Militello stated that he had no day to day duties and that he leased all his trucks to a company called American Motor Lines, who in turn paid and hired the drivers from a company called Michigan Staff Leasing. (R. 24, Ex. 3 to Ex. A, CS0068.) Mr. Militello also submitted a copy of his 1996 Federal Income Tax Return. (R. 36, ¶ 25; R. 21, ¶ 23.) The tax return listed business income and expenses for a business described as "trucking" and with the business name "Anthony Militello." (R. 24, Ex. 3 to Ex. A, CS0047.) Included among the expenses were $98,792 for "fuel" and $21,390 for a "driver bonus." (R. 24, Ex. 3 to Ex. A, CS0048.) After considering all of the new information provided by Mr.

Militello and the union, Central States determined that he had engaged in prohibited reemployment under the Pension Plan because he was the self-employed owner of a trucking company. (R. 24, Ex. 3 to Ex. A, CS0035.) Central States advised Mr. Militello that his pension benefits would be suspended if he did not terminate his employment. (R. 24, Ex. 3 to Ex. A, CS0035.) After Mr. Militello failed to comply, Central States had no choice but to suspend his benefits in accordance with the Pension Plan. (R. 24, ¶ 30.)

Pursuant to Central States' appeals process, Mr. Militello appealed the suspension of his benefits. Mr. Militello exhausted his administrative appeals by taking his claim before the Board of Trustees. On June 10, 1998, the Trustees reviewed all of the information contained in the administrative record and determined that Mr. Militello's employment by and ownership of Anthony Militello Trucking constituted prohibited reemployment and upheld the suspension of his benefits. (R. 24, Ex. 3 to Ex. A, CS0003.)

B. The District Court Determined That There Was Sufficient Evidence To Uphold The Trustees' Decision.

On April 23, 2001, Mr. Militello filed suit under ERISA, 29 U.S.C. § 1132, seeking to overturn the suspension of his benefits. In the District Court, Mr. Militello argued that the Trustees' decision to suspend his benefits should be reviewed *de novo*, that the suspension of his benefits was based on an unlawful and nonuniform interpretation of the Pension Plan in violation of 29 U.S.C. § 1132(a)(1)(B), that he was not given adequate notice of the reasons for his suspension under 29 U.S.C. § 1133(a) and that the suspension of his benefits violated 29 U.S.C. § 1053.

The District Court reviewed the Pension Plan and Central States' Trust Agreement and held that both documents conferred the Trustees with discretionary authority to deter-

mine eligibility for benefits. *Militello v. Central States, Southeast and Southwest Areas Pension Fund*, 209 F.Supp.2d 923, 928-29 (N.D.Ill. 2002). Accordingly, the District Court reviewed the Trustees' decision to suspend Mr. Militello's benefits under the arbitrary and capricious standard. *Id.* at 929. After reviewing the evidence that was considered by the Trustees, the District Court determined that there was sufficient evidence to conclude that Mr. Militello had engaged in prohibited reemployment under the Pension Plan. Specifically, the District Court noted that if Mr. Militello was simply leasing the trucks to another company, "he would not have incurred anything in driver expenses or much at all in the way of fuel expenses." *Id.* at 930. After rejecting Mr. Militello's remaining arguments, the District Court upheld the Trustees' decision and entered summary judgment for Central States. *Id.* at 934.

C. The Seventh Circuit Determined That There Was Sufficient Evidence To Uphold The Trustees' Decision.

Mr. Militello appealed the District Court's decision to the Seventh Circuit and presented the same arguments (and some new arguments). Like the District Court, the Seventh Circuit specifically noted that the fuel expenses and driver bonus listed on Mr. Militello's tax return suggested that he was running a trucking business that employed drivers. *Militello v. Central States, Southeast and Southwest Areas Pension Fund*, 360 F.3d 681, 687 (7th Cir. 2004). The court also noted that Mr. Militello listed his business as "trucking" and that the information provided to the Trustees was consistent with the union representative's statement. *Id.* at 687. After concluding that such activity violated the plan's prohibition against managing employees, supervising employees, or engaging in self-employment in the trucking industry, the Seventh Circuit upheld the Trustees' decision and affirmed the District Court.

REASONS FOR DENYING THE PETITION

A. There Is No Compelling Reason To Grant Mr. Militello's Petition.

Ever since this Court's decision in *Lau Ow Bew*, 141 U.S. 583, 12 S.Ct. 43 (1891), the Court has exercised great restraint in granting certiorari. The power has been sparingly used and reserved for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 383, 13 S.Ct. 758 (1893). Mr. Militello's case satisfies neither requirement. There is no conflict between the circuit courts on any issue raised by Mr. Militello and no important federal question was decided in a way which conflicts with decisions from this Court. Mr. Militello's case satisfies none of the "compelling reasons" listed in Supreme Court Rule 10.

Mr. Militello has framed the questions presented as broadly as possible to convey the impression that the Seventh Circuit's decision will impact millions of people. However, Mr. Militello's case turned on the Trustees' interpretation of the individual facts involved, not a general statement of the law. Accordingly, it is unlikely that it will have a lasting impact on anyone other than Mr. Militello. Admittedly, the case, like any other case, is important to the individual involved. However, that is not a compelling reason to grant certiorari. Granting Mr. Militello's petition will not "secure uniformity of decision" since there is no split of authority among the Circuit Court of Appeals regarding the issues involved. No important question of federal law has been decided by the Seventh Circuit which conflicts with decisions from this Court. Accordingly, Mr. Militello's petition should be denied.

B. Mr. Militello Waived His Argument That Central States Violated ERISA's "Anti-Cutback" Rule Because He Failed To Raise It In The Lower Courts.

In light of this Court's recent decision in *Central Laborers' Pension Fund v. Heinz*, – U.S. –, 124 S.Ct. 2230 (2004), Mr. Militello argues that Central States violated ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g). However, neither the District Court nor the Seventh Circuit addressed the applicability of the anti-cutback rule to this case because Mr. Militello never raised this argument in the lower courts. He should not be allowed to raise it for the first time before this Court.[1] *Glover v. U.S.*, 531 U.S. 198, 205, 121 S.Ct. 696 (2001)(only in exceptional cases does the Court decide questions not raised or resolved in the lower courts).

Even if this Court allows Mr. Militello to rely on *Heinz* and assert the "anti-cutback" argument, it is doomed to fail. In *Heinz*, this Court held that ERISA's anti-cutback rule, 29 U.S.C. § 1054(g), prohibited the amendment of a pension plan which expanded the categories of post-retirement employment (*i.e.*, prohibited reemployment) that triggers suspension of payment of early retirement benefits that had already accrued. Section 1054(g)[2] and *Heinz* are inapplicable to the case at bar because there was no amendment to Central States' prohibited reemployment rules. Indeed, Mr. Militello does not claim there was an amendment to the Pension Plan. Instead, he raises the novel legal claim that an alleged "reinterpretation" of the Pension Plan rules is tantamount to an amendment.

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[1] Since the Seventh Circuit decided *Heinz* on September 13, 2002, Mr. Militello had the opportunity to rely on that case prior to the filing of his opening brief.

[2] All statutory citations contained in this brief refer to "29 U.S.C. §____" unless indicated otherwise.

Central States' Pension Plan prohibits a participant from engaging in certain types of employment after his retirement. The prohibited reemployment rules provide that a pensioner will have his pension benefits permanently suspended for any month before his normal retirement age (65) in which he works in "Prohibited Reemployment." (R. 24, Ex. 2 to Ex. A, pp. 21, 57-59.) The term "Prohibited Reemployment" is defined in the Pension Plan, in relevant part, as:

> Employment in any position, including a managerial or supervisory position and including self-employment, but not including government employment, either in the same industry in which the Participant or Pensioner earned any Contributory Service Credit while covered by the Pension Fund, or in any other industry if the Participant or Pensioner is in the same job classification as are other Participants then employed by a Contributing Employer located within the same standard metropolitan statistical area.

(R. 24, Ex. 2 to Ex. A, p. 59.) In contrast to *Heinz*, there was no amendment to this rule during the relevant time periods. Since there was no amendment, Mr. Militello is forced to argue (for the first time) that the Trustees violated ERISA's anti-cutback rule by "reinterpreting" the prohibited reemployment rules to include expanded categories of post-retirement activities which would trigger benefit suspensions. This is false.

Notably, Mr. Militello fails to point to any evidence or cite to specific examples to show that the Trustees "reinterpreted" the prohibited reemployment rules. Additionally, Mr. Militello's argument contradicts the Seventh Circuit's holding that the Trustees' decision was consistent with "the plan's *plain language* . . . that owning a trucking business that employed drivers violated the plan's prohibition against managing employees, supervising employees, or engaging in

self-employment in the trucking industry." *Militello*, 360 F.3d at 688 (emphasis added).

Certiorari should not be granted because Mr. Militello waived his "anti-cutback" argument by failing to raise it in the lower courts. Even if it is not deemed waived, the argument is frivolous because there was no condition added to the Pension Plan with regard to Mr. Militello's accrued benefits and there was no amendment or "reinterpretation" of the prohibited reemployment rules.

C. The Seventh Circuit Correctly Held That 29 U.S.C. §1053(a) And 29 C.F.R. § 2530.203-3 Do Not Apply To Claimants Who Have Not Attained Normal Retirement Age.

In his petition, Mr. Militello asks this Court to review the Seventh Circuit's holding that § 1053(a) and its accompanying regulations do not apply to claimants who have not attained normal retirement age. Since the Seventh Circuit's decision is consistent with the plain language of ERISA and the applicable regulations, Mr. Militello's petition should be denied.

Mr. Militello argues that § 1053(a) and its accompanying regulations do not permit benefit suspensions for self-employment. Mr. Militello notes that 29 C.F.R. § 2530.203-3(c)(2) only speaks of "service (as defined in § 2530.200b-2(a)(1) and (2))", which in turn mentions work for another employer—not self-employment. Since he was self-employed, Mr. Militello concludes that Central States had no authority under 29 U.S.C. § 1053 and 29 C.F.R. § 2530.203-3 to suspend his benefits. Mr. Militello fails to mention that part (a) of the regulation specifically excludes claimants who have not attained normal retirement age from its protection:

> (a) General. Section 203(a)(3)(B) [29 U.S.C. § 1053 (a)(3)(B)] of the Act provides that the right to the employer-derived portion of an accrued pension benefit

> shall not be treated as forfeitable . . . This section sets forth the circumstances and conditions under which such benefit payments may be suspended. **A plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age**, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for any reemployment and **without regard to the provisions of section 203(a)(3)(B) and this regulation** to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof.

29 C.F.R. § 2530.203-3(a) (emphasis added). The "normal retirement age" under the Pension Plan is sixty-five. (R. 24, Ex. 2 to Ex. A, p. 21.) Mr. Militello retired at age fifty-three and has still not attained the normal retirement age. (R. 36, ¶¶ 18 & 20.) Accordingly, the Seventh Circuit correctly held that § 1053(a) and 29 C.F.R. § 2530.203-3 did not apply to Mr. Militello. *Militello*, 360 F.3d at 691; *see also Whisman v. Robbins*, 55 F.3d 1140, 1146 (6th Cir. 1995) (holding that a plan may suspend otherwise accrued benefits without regard to the provisions of § 1053(a)(3)(B) and 29 C.F.R. § 2530.203-3 when a participant retires prior to "normal retirement age" and then begins other employment). In other words, it is irrelevant whether self-employment is considered "service" under 29 C.F.R. § 2530.203-3 because Central States was allowed to suspend Mr. Militello's pension benefits without regard to 29 U.S.C. § 1053(a) and 29 C.F.R. § 2530.203-3.[3]

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[3] Under the Central States Pension Plan, "[e]mployment in any position, including a managerial or supervisory position and **including self-employment**" can qualify as Prohibited Reemployment. (R. 24, Ex. 2 to Ex. A, p. 59) (emphasis added.)

Citing *Heinz*, Mr. Militello argues that suspensions under § 1053(a)(3)(B) are permissible only in narrow circumstances—regardless of reaching normal retirement age. Mr. Militello misreads *Heinz* because that case did not address the applicability of § 1053(a)(3)(B) to claimants who retire prior to normal retirement age. However, even if Mr. Militello's reading of *Heinz* is correct, the "narrow circumstances" was satisfied here by the finding that Mr. Militello was employed in the trucking business after he retired.

The Seventh Circuit correctly held that § 1053(a) and 29 C.F.R. § 2530.203-3 do not apply to claimants who have not attained normal retirement age. The Seventh Circuit's decision is consistent with the plain text of ERISA and the regulations. Accordingly, Mr. Militello's petition should be denied.

D. The Seventh Circuit Correctly Relied On The Central States Trust Agreement In Holding That The Trustees' Decision Should Be Reviewed Under The Arbitrary And Capricious Standard.

In the courts below, Mr. Militello argued that the Trustees' decision to suspend his benefits should be reviewed *de novo*. In addressing this argument, the Seventh Circuit reviewed the terms of the Central States Trust Agreement (the "Trust Agreement") and held that it conferred broad discretionary authority to determine eligibility for benefits.[4] *Militello*, 360 F.3d at 685-86. Mr. Militello argues that certiorari should be granted because the discretion afforded under the Trust Agreement is irrelevant. Specifically, he argues that the Trust Agreement is not an ERISA "plan document" which informs participants of their rights and obligations. However, he offers no authority in support of his argument. Indeed, Mr.

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[4] Although not addressed by the Seventh Circuit, Central States maintains that the Pension Plan also confers the Trustees with discretionary authority.

Militello's argument conflicts with ERISA and this Court's prior decisions.

ERISA provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1); *see also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83, 115 S.Ct. 1223 (1995). "In the words of the key congressional report, '[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan.'" *Id.* at 83 (quoting H.R. Rep. No. 93-1280 at 297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5077, 5078). ERISA gives effect to this "written plan documents" scheme through the "reporting and disclosure" requirements in 29 U.S.C. §§ 1021-1031. *Curtiss-Wright*, 514 U.S. at 83, 115 S.Ct. 1223. One of the formal "plan documents" that must be available for examination under ERISA's reporting and disclosure requirements is the "trust agreement." 29 U.S.C. § 1024(b)(2). If requested, the plan must furnish a copy of the trust agreement to the plan participant. 29 U.S.C. § 1024(b)(4). By definition, the Trust Agreement is an ERISA "plan document."

Mr. Militello's argument also conflicts with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989). In *Firestone*, 489 U.S. at 111, 109 S.Ct. 948, this Court cited *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, 105 S.Ct. 2833 (1985), for the proposition that in determining the appropriate standard of review under ERISA, a court must be guided by principles of trust law. In *Central Transport*, the Court construed the provisions of the Central States Trust Agreement and observed that it gave the Trustees authority to do all acts necessary and proper for the protection of property held under the Trust Agreement. 472 U.S. at 565-66, 105 S.Ct. 2833.

The Seventh Circuit correctly relied on the Trust Agreement in determining that the Trustees' decision to suspend Mr. Militello's benefits should be reviewed under the arbitrary and capricious standard. The Trust Agreement is an ERISA "plan document" which notifies participants of the broad discretionary authority afforded the Trustees to determine eligibility for benefits. The Seventh Circuit's decision is consistent with ERISA and this Court's prior decisions. Mr. Militello's petition should be denied.

CONCLUSION

Traditionally, the Court has reserved its certiorari power for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." The Seventh Circuit's decision will not have a lasting impact on anyone other than Mr. Militello. Additionally, there is no split of authority among the Circuit Court of Appeals and no important federal question was wrongly decided. The Trustees' decision to suspend Mr. Militello's benefits has already been reviewed and upheld by two courts. Mr. Militello is not entitled to review by this Court simply because he disagrees with the lower courts' decisions. The Seventh Circuit correctly upheld the Trustees' decision in accordance with the plain text of ERISA, its regulations and this Court's prior decisions. For these reasons, Respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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